RECORD AND BRIEFS

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No. 15-1406

IN THE SUPREME COURT OF THE UNITED STATES

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

LEROY HAEGER, ET. AL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NAM is concerned that failure to require a direct causal link between a litigant's alleged discovery violations and compensatory damages to other parties can lead to abusive sanctions, particularly for manufacturers. Developing products can generate huge sums of data and make discovery a complex undertaking fraught with potential mistake and gamesmanship. Requiring compensatory damages to be anchored by causation can help assure that discovery sanctions will not undermine the search for truth and a court's ability to facilitate justice.

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[1] Pursuant to Rule 37.6, counsel for NAM certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than the NAM, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. The Parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Chambers v. NASCO, Inc.*, the Court sought to achieve a delicate balance for how courts sanction serious discovery misconduct. *See* 501 U.S. 32 (1991). The Court provided judges with the inherent authority to "assess attorney's fees when a party has acted in bad faith" during discovery, but told courts to "exercise caution in invoking [this] inherent power . . . both in determining that the requisite bad faith exists and in assessing fees." *Id.* at 45, 50. The sole issue in this appeal is clarifying the limitations that exist on the amount of fees assessed. In *Chambers*, the Court ruled that all fee shifting sanctions "must comply with the mandates of due process" and be limited to compensating the affected party for the consequences of the disobedience. *Id.* at 50, 54. The Court can now make clear that a causal connection between the discovery misconduct and the fees assessed is fundamental to both of these limitations.

In the instant case, the District Court abrogated its responsibility to tie the fee-shifting sanction to only those fees caused by the alleged malfeasance. In fining Defendant $2.7 million, it awarded *all* of the Plaintiff's attorneys' fees and costs that were incurred *after* the alleged discovery violation. The court acknowledged it did not "draw the precise causal connections between the misconduct and the fees Plaintiffs incurred." Pet. App. 180a. It also did not "determine how the litigation would have proceeded if Goodyear had made the proper disclosures." *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1242 (9th Cir. 2016). In affirming the award amount, the Court of Appeals for the Ninth Circuit

accepted this *post hoc ergo propter hoc* fallacy of whatever happens *after* an event can be attributed to the event. *See id.* at 1252. As a result, Defendant is undoubtedly overcompensating Plaintiff for more than the fees and costs caused by its noncompliance.

As this brief shows, this Court has been clear that overcompensating a litigant for its economic compensatory damages is unlawful. This is true whether compensatory damages are ordered for sanctions or substantive liability. For sanctions, any amount paid to another party for attorney fees and costs not caused by one's alleged misconduct is punitive and, therefore, criminal in nature. The District Court could have punished Defendant beyond that which was needed to make Plaintiffs whole for their losses, but it would have had to identify this amount and engage in a separate, criminal process to levy those sanctions. The lack of necessary findings and corresponding overcompensation violate Defendant's due process protections. The fine ought not be upheld.

Failure to require this causal connection also creates the opportunity for a court to arrive at a sanction amount unmoored by a limiting principle. Judges seeking to impose harsher penalties than allowed under statutory or Rule-based sanctions will be incentivized to invoke their inherent authority, even when the standards in the written rules are on point and resulted from well-considered deliberations. As discussed below, allegations of discovery violations have proven particularly vulnerable to manipulation and excessive sanctions, which can interfere with the ability of parties to achieve justice through the courts. Thus, for both legal and important public policy reasons, *amicus* respectfully urges the Court

to hold that a direct causation standard is needed when assessing inherent authority sanctions.

ARGUMENT

I. CAUSATION IS THE FOUNDATIONAL ELEMENT FOR DETERMINING COMPENSATORY DAMAGES

Under the "American Rule," each party to a lawsuit must pay his or her own fees and costs. *See Alyeska Pipeline Service Co., v. Wilderness Society*, 421 U.S. 240 (1975) (calling this obligation "deeply rooted in our history and in congressional policy"). There are rare exceptions for when courts can reallocate the burdens of litigation. In *Chambers*, the Court held that a judge has the inherent authority to order fee-shifting over pre-trial discovery when one of the parties, as alleged here, acts in "bad faith, vexatiously, wantonly, or for oppressive reasons." 501 U.S. at 45 (quoting *Alyeska*, 421 U.S. at 258-259). Once a court establishes a finding of bad faith, the question becomes what limitations exist for the scope of the sanctions imposed on that party.

In *Chambers*, the Court held that the amount of attorney's fees awarded can be only that which is needed to "make[] the prevailing party whole for expenses caused by his opponent's obstinacy." *Chambers*, 501 U.S. at 46 (quoting *Hutto v. Finney*, 437 U.S. 678, 689, n. 14 (1978)). So, while the decision to award sanctions is punitive in order to vindicate the court's authority over the recalcitrant litigant, the amount of the sanctions is purely compensatory. The punishment is paying costs that the litigant wrongly made another party incur from its malfeasance.

To give further guidance, the Court equated calculating compensatory damages under this inherent authority to the Court's jurisprudence for civil contempt sanctions. *See id.* at 53-54 (stating that awarding attorney's fees under inherent power sanctions is not distinguishable from "a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience"). For contempt sanctions, the Court has been clear that a civil fine cannot exceed the amount needed to compensate the affected parties for specific "losses sustained" from the misconduct. *Int'l Union v. Bagwell*, 512 U.S. 821 (1994). In *Bagwell*, the Court explained that this delineation must remain firm because any amount of the sanction not directly compensatory is, by definition, criminal and invokes a higher level of due process. *Id.* at 829.[2]

Thus, when courts issue sanctions, under inherent or contempt authority, they are obligated to determine which damages directly resulted from the alleged misconduct. As discussed above, the District Court here admittedly did not take this needed step. Judge Watford underscored this point in his dissent, stating the record is "devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded." *Haeger*, 813 F.3d at 1255. The Court must require judges to establish this causal link.

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[2] In *Bagwell*, the Court found that a civil fine could also be levied if the recalcitrant litigant has an opportunity to avoid the fine through compliance, but that was not available in this case because the litigation had already settled. *See* 512 U.S. at 829.

A. Causation Is the Lynchpin for Compensatory Damages; It Ensures Compensation Is Tied to Losses

"But for" causation is the bedrock element for determining compensation, regardless of whether compensation is due from sanctions or substantive liability. "A fundamental premise of our legal system is the notion that damages are awarded to compensate the victim—to redress the injuries that he or she actually has suffered." *Smith v. Wade*, 461 U.S. 30, 57-58 (1983) (Rehnquist, J., dissenting) (citing D. Dobbs, Remedies § 3.1 (1973); C. McCormick, The Law of Damages 1 (1935)); *see also* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* § 41, 263 (5th ed. 1984) (requiring a "reasonable connection between the act or omission of the defendant and the damage" alleged); Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986) (The "common thread" for proximate cause is that "defendant's wrongful conduct must be a cause in fact of plaintiff's injury.").

Accordingly, the Court has applied "but for" causation for establishing compensatory damages across a wide-range of substantive areas of law. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007) (stating "compensatory damages are measured by the harm the defendant has *caused* the plaintiff") (emphasis added); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011) ("[I]nvestors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss."); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997) (declining to recognize claim for medical monitoring under Federal Employers' Liability Act where employer did not cause a

physical injury); *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) ("In order to recover compensatory damages . . . plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury.").

The Court should apply the same causation limitation on compensatory damages here. *See Chambers*, 501 U.S. at 60-61 (Kennedy, J., dissenting) (stating that a court's outrage at a given misconduct "should not obscure the boundaries of settled legal categories"). Causation has proven to be the necessary barometer for compensation. It provides a clear, fair, and predictable standard by ensuring that a sanction is tailored to the impact of the misconduct. Here, as the dissent explained, the District Court had several options for how it could have fashioned a remedy to compensate Plaintiff for the injuries incurred by Defendant's alleged discovery violation.

By contrast, removing causation from compensatory damages creates an anchorless ship: courts would have untethered authority to sanction parties. Many judges would undoubtedly show proper restraint in exercising this authority, but, as Justice Scalia warned in *Bagwell*, "[t]hat one and the same person would be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." 512 U.S. at 840 (Scalia, J., concurring). "[E]ven the best-tempered judges can lose their impartiality when dealing with misconduct that they perceive as a personal attack." Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 765 (2001). As discussed further in Section II of this brief, these

dynamics can distort the scales of justice, particularly with alleged discovery violations.

Adhering to causation principles provides the rudder Justice Kennedy sought in *Chambers*, when he cautioned against creating an inherent authority to sanction "without specific definitional or procedural limits." 501 U.S. at 70 (Kennedy, J., dissenting). If a remedy is greater than compensation, as it clearly is here, it raises the "acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (discussing vagueness).[3] Parties subject to sanctions, even though they allegedly engaged in bad faith, are still entitled to be treated in a consistent and fair manner and to have their basic due process protections.

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[3] To avoid due process concerns with mixing compensatory and punitive damages, courts often bifurcate trials so that the proceedings on punitive damages are separate from proceedings on compensatory damages. *See* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 946 (1989); James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 446 (1995).

Finally, the Court should not accept the District Court's declaration that it was "impossible" to separate the fees incurred by legitimate activity and those from Defendant's alleged refusal to abide by the discovery request. *Haeger*, 813 F.3d at 1247. As discussed above, courts regularly assess causal connections with respect to compensatory damages. "[N]either the likelihood of [injury] nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused." *Carey v. Piphus*, 435 U.S. 247, 264 (1978). District courts should not be alleviated of this foundational responsibility when levying sanctions under its inherent authority, including for discovery violations, as alleged here.

B. Unbounded Inherent Authority Can Undermine Well-Crafted Statutory and Rule-Based Sanctions

Requiring causation in determining sanctions for compensatory damages will also allay the other concern Justice Kennedy expressed in *Chambers*, namely that "a district court may disregard the requirements of otherwise applicable Rules and statutes and instead exercise inherent power to impose sanctions." 501 U.S. at 63 (Kennedy, J., dissenting). The Court allowed inherent authority sanctions "even if procedural rules exist which sanction the same conduct," *id.* at 49, and Justice Kennedy feared courts will treat inherent powers "as the norm and textual bases of authority as the exception." *Id.* at 63. Without proper standards and safeguards, determining the amount of inherent authority sanctions would be completely discretionary and, therefore, easier to impose and defend.

In an effort to assuage Justice Kennedy's concerns, the Court instructed judges that "inherent power must continue to exist to fill in the interstices" not reached by statutory and rule-based sanctions, but when there are other such rules, they "must, of course, exercise caution in invoking [their] inherent power." *Id.* at 46, 50. This statement reinforced earlier rulings on inherent power that it "must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). More recently, the Court appeared to go a step further, asserting that "an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016).[4] Yet, the relationship between inherent powers and written sanctions is still murky, and as discussed in Section II below, Justice Kennedy's concerns have been realized in some instances.[5] Courts will continue to find inherent authority attractive if it provides them with

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[4] *See also Degen v. United States*, 517 U.S. 820, 827 (1996) ("A court's inherent power is limited by the necessity giving rise to its exercise."). Lower courts have adhered to these warnings. *See, e.g.*, *Tucker v. Williams*, 682 F.3d 654, 662 (7th Cir. 2012) (echoing that inherent power "is not a grant of authority to . . . undermine the American rule").

[5] This Court has also acknowledged that "there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen*, 517 U.S. at 823.

significant discretion and, accordingly, minimal appellate oversight.

This case, therefore, provides this Court with the opportunity to restore the balance sought in *Chambers*. Inherent power sanctions can still co-exist with written sanction authority, but by limiting the amount of the award to truly compensatory damages, it protects against creating a super-sanction, where courts can avoid the structure and restrictions of statutory and rule-based sanctions and do not have to fully justify the sanction amounts. *Cf. Bloom v. Illinois*, 391 U.S. 194, 207-08 (1968) ("[T]he unwisdom of vesting the judiciary with completely untrammeled power to punish contempt . . . makes clear the need for effective safeguards against the power's abuse."); *Bagwell*, 512 U.S. at 831 (finding judicial-based sanctions "uniquely . . . liable to abuse").

This Court should overturn the sanction here because it is not moored by causation and creates a penal fine without the required due process protections.

II. INHERENT AUTHORITY TO SANCTION DISCOVERY VIOLATIONS SHOULD BE WELL-DEFINED TO PREVENT SANCTION SHOPPING AND GAMESMANSHIP

The unbounded sanction authority Plaintiff seeks should also be viewed in the context of the decades-long concerns over the ability of parties to engage in improper discovery gamesmanship. The purpose of discovery, which is uniquely American, is to facilitate the search for truth. NAM views the fair and efficient functioning of the U.S. civil justice system to be a critical element of American global competitive-

ness. Too often in complex litigation, though, the costs and imperfections of discovery interfere with achieving justice in the courts. Not limiting damages to only those caused by the alleged malfeasance will worsen this problem by eroding confidence in the discovery process, undermining Federal Rule amendments to create greater certainty and fairness in discovery, and incentivizing discovery gamesmanship.

The manufacturing process, which includes developing, testing, and producing products, can be complex, time-consuming, and costly endeavors leading to enormous quantities of documents and electronic data. Discovery and corresponding retention obligations already are significant drivers of litigation costs, particularly for manufacturers. *See* The Third Branch: Newsletter of The Federal Courts, Vol. 31, No. 10 (Oct. 1999) ("Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used."). A NAM member company testified at a hearing on recent amendments to the Federal Rules that it spent twice as much on discovery in 2012 as it paid to claimants in settlements and judgments. *See* Linda Kelly, Comments on Proposed Amendments to the Federal Rules of Civil Procedure (USC-RULES-CV-2013-0002), Nat'l Assoc. of Manufacturers, at 3 (Feb. 14, 2013).[6]

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[6] Discovery costs have been "notoriously expensive and time-consuming" on small businesses as well. Tom O'Connor, *Cost-Effective e-Discovery for Small Cases*, ABA GP Solo (Jan./Feb. 2013); *cf.* Inst. for the Advancement of the of the Am. Legal Sys., Electronic Discovery: A View from the Front Lines 25

In some lawsuits, "[d]iscovery has now become the main event—the end game—in pretrial litigation proceedings." Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004). It has been well-documented that the threat of a major discovery request can lead parties to settle rather than litigate, irrespective of a case's merits. In addition to costs, businesses are worried about unwarranted sanctions. "[T]he notion of having all information on a subject is almost unattainable." Report of the Advisory Committee on Civil Rules 4 (May 1998). Thus, regardless of how well one complies with discovery demands, there can be allegations that a page, document, or flash drive has not been produced. A violation appearing to a court to be in "bad faith," may actually be the result of mistake, misunderstanding, or the inability to adhere to voluminous or complex production orders. Discovery sanctions have become increasingly common. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 790-91 (2010) (examining the "significant increase" of e-discovery sanctions since 2004).

Giving parties access to windfall recoveries in excess of their corresponding attorney's fees and costs will incentivize more discovery disputes and lead to greater injustices. The inherent authority plaintiff seeks will make the problem worse, not better.

(2008) (reporting "e-discovery has penetrated even 'midsize' cases, potentially generating an average of $3.5 million in litigation costs for typical lawsuit").

A. Inherent Authority Sanctions Should Not Overtake the Recent Federal Rule Changes that Provide Greater Certainty for Sanctioning Discovery Violations

The Federal Rules recently underwent several modifications in an effort to curb the potential that discovery sanctions would distort litigation outcomes. These changes added important protections for manufacturers and other entities where preservation and production of documents can present complex undertakings. *See* Hon. John G. Koetl, From the Bench: Rulemaking, ABA Litigation, Vol. 41, No. 3 (Spring 2015) (explaining the changes provide needed "consistency and coherence" to the ways courts handle claims of failure to preserve and produce documents). These rules were the object of much discussion, generating more than 2,350 comments. *See* Proposed Amendments to the Federal Rules of Civil Procedure, *at* https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002. After lengthy consideration, the amendments took effect in December 2015.

Among the changes to the Federal Rules was to Rule 37(e), which authorizes and specifies measures a court may employ if certain information that should have been preserved is lost, and therefore not produced in discovery. *See* Fed. R. Civ. P. 37(e). The new Rule specifies the findings necessary to justify sanctions. It provides that a court can sanction a party for failing to preserve electronically stored information, including for the failure to take reasonable steps to preserve it, only when there is prejudice to another party, in which case the court "may order measures no greater than necessary to cure the prejudice," or "upon finding that the party acted with the

intent to deprive another party of the information's use in the litigation." *Id.*

Thus, the new Rule 37(e) developed the standards for when a court has sanction authority and, conversely, when a party is not to be subject to sanction. Whether the Court imposes needed restrictions on the inherent power to sanction in the case at bar could have a direct impact on the ability of the new Rule to achieve this balance. Rule 37(e) will be no more than a paper tiger if the inherent power sanction is left unchecked here.

The boundary between Rule 37 and inherent authority has already been subject to significant debate. The Committee Notes accompanying the Rule 37 change state that the new Rule is intended to "foreclose[] reliance on inherent authority" for when sanctions for failure to preserve this information can be levied and what those sanctions can be. Fed. R. Civ. P. 37 Advisory Comm. Note to 2015 Amendments. Yet, several courts have asserted the ability under *Chambers* to sanction shop between their inherent authority and the new Rule. *See, e.g., Cat3 v. Black Lineage*, 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016) ("Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue."); *Freidman v. Phila. Parking Auth.*, 2016 WL 6247470, at *8 (E.D. Pa. Mar. 10, 2016) ("[O]ur findings under Rule 37(e) do not end our analysis. . . . We are vested with broad discretion to fashion an appropriate remedy under our inherent powers."); *Internmatch v. Nxtbigthing*, 2016 WL 491483, at *4, n. 6 (N.D. Cal. Feb. 8, 2016) ("Whether a district court must now

make findings set forth in Rule 37 before exercising its inherent authority to impose sanctions . . . has not been decided.").

Properly restraining inherent authority sanctions here, therefore, can reduce the attractiveness of using it when Rule 37(e) or some other rule should govern. It can also send a message to lower courts that blatant sanction shopping is not encouraged. Otherwise, inherent authority sanctions will become the exception that swallows the Federal Rules.

B. Placing Causation Limits on Inherent Authority Sanctions Reduces Incentives to Litigate By Sanction

Placing a causation restraint on a judge's inherent authority to sanction a party is also needed to curb discovery gamesmanship, which manufacturers and other business regularly face in civil litigation. The high dollar stakes associated with discovery disputes has long created a significant incentive for litigants to aggressively pursue sanctions. *See, e.g.*, Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 BAYLOR L. REV. 737, 738 (1994) (finding "discovery 'gamesmanship' has become an integral part of litigation practice"); Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991, at 22 (describing how lawyers engage in "outcome-determinative pretrial gamesmanship"). The opportunity for such gamesmanship is most acute when the discovery obligations in a case are lopsided, as with personal injury or so-called "patent troll" cases against product manufacturers.

As this Court has recognized, "many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery." *Roadway Exp.*, 447 U.S. at 757 n.4. Over the decades, lawyers have developed techniques for setting discovery-related "traps" to trigger sanctions. *See, e.g.*, Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 FORDHAM L. REV. 959, 965 (1995) (explaining that instigating sanctions "is now a standard part of the modern litigation's play book"); Sherman Joyce, *The Emerging Business Threat of Civil 'Death Penalty' Sanctions*, 18:21 Legal Backgrounder (Wash. Legal Found. Sept. 10, 2009), at 1 ("personal injury attorneys have begun using [sanctions] as just another litigation tactic against civil defendants"); Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, Litigation, Vol. 36, No. 2 (Winter 2010) (providing tips for sanctions motions).

For example, some lawyers intentionally provoke disputes by "seek[ing] impossibly broad discovery or, alternatively, discovery of the same information from multiple sources" and move for sanctions "when mistakes are inevitably uncovered." *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action*, Lawyers for Civil Justice, at 5 (Aug. 2011). They try to create the perception of bad faith by inundating courts "with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent." *Id.* They also may seek "discovery on discovery" by challenging the process a manufacturer

or other business uses for responding to discovery requests, rather than the results of that process.[7]

In these scenarios, the lawyer's goal is to stoke a judge's anger at the opposing party, accuse the other party of intentionally obstructing justice, and then seek broad sanctions. They know, as this Court has expressed, that "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament." *Bagwell*, 512 U.S. at 831; *see also* Pushaw, 86 IOWA L. REV. at 738 (observing that "sanctions sometimes reflect [judges'] personal pique"). This practice has been termed "litigation by sanction" or the "sanction tort," because by "racking up enough sanctions during discovery, the merits of the case might never be reach at all." Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 REV. LITIG. 267, 270 (1996). Windfall sanctions, not liability, create funds for them and their clients.

The combination of litigants' discovery gamesmanship and courts' potentially unchecked inherent sanctioning authority creates an almost standardless legal environment. Requiring a causal connection between discovery misconduct and the assessment of attorney's fees as a compensatory discovery sanction may not prevent all discovery abuse, but it provides an important check on a judge's inherent authority and can reduce the incentives to orchestrate purported discovery violations.

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[7] The recent Fed. R. Civ. P. Committee Notes counsel against unwarranted "discovery on discovery" but, as with the exclusivity of Rule 37 sanctions, adherence to this Note remains in question.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court reverse the Ninth Circuit, vacate the award of attorney's fees, and remand with instructions to apply a direct causation standard for inherent authority sanctions.

Respectfully submitted,

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